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No. 98-1696

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ROY LEE JOHNSON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a federal criminal defendant's term of supervised release commences on the date of his actual release from prison or on the earlier date on which he would have been released in accordance with a subsequent change in the law that is retroactively applied.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 154 F.3d 569. The opinion of the district court (Pet. App. 9a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1998. A petition for rehearing was denied on January 21, 1999 (Pet. App. 18a). The petition for a writ of certiorari was filed on April 21, 1999, and was granted on September 10, 1999. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Title 18 of the United States Code, Sections 3553(a), 3583, and 3624(a) and (e),

are reproduced in an appendix to this brief (App., *infra*, 1a-10a).

STATEMENT

1. In the Comprehensive Crime Control Act of 1984, Congress adopted an array of sentencing reform provisions, which were designed to achieve greater consistency, coherence, and certainty in federal criminal sentencing. Pub. L. No. 98-473, Title II, 98 Stat. 1976; see S. Rep. No. 225, 98th Cong., 1st Sess. 37, 39 (1983). One of those reforms was supervised release.[1] Congress, for the first time, authorized the district courts, in sentencing a defendant to a term of imprisonment for any felony or misdemeanor, to "include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment." § 212(a)(2), 98 Stat. 1999 (18 U.S.C. 3583(a)).[2] Congress directed the district courts to consider, in determining the duration and conditions of any term of supervised release, "the nature and circumstances of the offense," "the history and characteristics of the defendant," "the need * * * to afford adequate deterrence to criminal conduct," and "the need * * * to provide the defendant with needed educational or vocational training medical care, or other correctional treatment."

[1] The same statute established the United States Sentencing Commission and the sentencing guidelines system. See, *e.g.*, § 217(a), 98 Stat. 2017-2019 (28 U.S.C. 991-994); § 212(a)(2), 98 Stat. 1989 (18 U.S.C. 3553).

[2] Congress has since amended Section 3583(a) to provide that the district courts must impose a term of supervised release if the statute under which the defendant was convicted so requires, see, *e.g.*, 21 U.S.C. 841(b), or if the defendant was convicted for the first time of a crime involving domestic violence.

§ 212(a)(2), 98 Stat. 1989-1999 (18 U.S.C. 3553(a), 3583(c) and (d)).

Congress has mandated that a term of supervised release be imposed for particular offenses, such as manufacturing, distributing, or possessing with the intent to manufacture or distribute controlled substances, in violation of 21 U.S.C. 841(a). See 21 U.S.C. 841(b)(1) and (2) (requiring minimum terms of supervised release ranging from one year to ten years depending upon the nature of the offense, the quantity of drugs involved, and the defendant's criminal history). The Sentencing Guidelines provide that the district courts also should impose a term of supervised release in any other case in which the defendant is sentenced to a term of imprisonment for more than one year. Sentencing Guidelines § 5D1.1(a), comment. (n.1) (noting circumstances in which a court may depart from that Guideline).

2. In 1990, after a jury trial in the United States District Court for the Eastern District of Michigan, respondent was convicted on five counts: two counts of possession of drugs with intent to distribute them, in violation of 21 U.S.C. 841(a); two counts of use of a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c); and one count of possession of a firearm after having previously been convicted of a felony, in violation of 18 U.S.C. 922(g). He was sentenced to a total of 171 months' imprisonment, consisting of three concurrent 51-month terms on the Section 841(a) and Section 922(g) counts, to be followed by two consecutive 60-month terms on the Section 924(c) counts. Pet. App. 1a-2a.

The district court also imposed a three-year term of supervised release, the minimum term mandated by Congress for a violation of Section 841(a) involving the

quantity of drugs attributable to respondent. See 21 U.S.C. 841(b)(1)(C). In addition to the standard conditions of supervised release set forth in Section 3583(d) and Sentencing Guidelines § 5D1.3, the court imposed two special conditions of supervised release on respondent: that he "not possess, receive, or transport any firearm or dangerous weapons" and that he "participate in a program approved by the United States Probation Office for treatment of narcotic addiction or drug dependency." Judgment 3 (Jan. 25, 1991).

The court of appeals, while otherwise affirming respondent's convictions and sentence, held that the district court erred in imposing consecutive terms of imprisonment on the two Section 924(c) counts. See 25 F.3d 1335 (6th Cir. 1994) (en banc). On remand, the district court vacated the sentence on one of the Section 924(c) counts, thereby reducing respondent's total term of imprisonment to 111 months. Judgment 2 (Aug. 30, 1994).

After this Court's decision in *Bailey* v. *United States*, 516 U.S. 137 (1995), respondent moved, pursuant to 28 U.S.C. 2255, to vacate his Section 924(c) convictions.[3] He contended that those convictions were predicated on a construction of Section 924(c) that was rejected by this Court in *Bailey*. The United States did not oppose the motion. The district court vacated the Section 924(c) convictions and, because respondent had served

[3] In *Bailey*, the Court held that, to establish "use" of a firearm under Section 924(c), "the Government must show active employment of the firearm," and not "mere possession." 516 U.S. at 144. The Sixth Circuit, consistent with the rule widely applied in the lower courts, had previously permitted conviction without a showing of "active" use. See, *e.g.*, *United States* v. *Acosta-Cazares*, 878 F.2d 945, 952 (6th Cir.), cert. denied, 493 U.S. 899 (1989).

more than the 51 months' imprisonment to which he had been sentenced on the remaining counts, ordered his immediate release from prison. Pet. App. 2a, 12a.

Respondent then moved to vacate the remainder of his three-year term of supervised release on the Section 841(a) counts. He argued that his term of supervised release should be reduced to account for the two and one-half years that he spent in prison as a result of the Sixth Circuit's erroneous interpretation of Section 924(c). The district court denied the motion. Pet. App. 15a-17a. The court relied on both the text and the purpose of the statutory provisions governing supervised release. The court explained that 18 U.S.C. 3624(e) provides that a "term of supervised release commences on the day the person is released from imprisonment" and "does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State or local crime." Pet. App. 15a (quoting 18 U.S.C. 3624(e)). The court also recognized that "supervised release and imprisonment fulfill distinct purposes," because supervised release, unlike imprisonment, is designed "to aid the defendant's transition from incarceration to life in the community." *Ibid.*

3. A divided panel of the Sixth Circuit reversed. The panel held that respondent's term of supervised release began on "the date he was entitled to be released" from prison under a sentence that excluded the subsequently vacated Section 924(c) convictions, "rather than the day he walked out the prison door." Pet. App. 4a-5a.

The panel acknowledged that the text of 18 U.S.C. 3624(e), if "[r]ead in isolation," would support the district court's position that a person's term of supervised release does not begin until he is actually released from prison. Pet. App. 4a. But the panel concluded that such

a reading would be inconsistent with 18 U.S.C. 3624(a), another section of the same statute, which states that "[a] prisoner shall be released by the Bureau of Prisons on the date of the expiration of [his] term of imprisonment." The panel viewed Section 3624(a) as "embod[ying] Congress's intent that a prisoner not be held in prison following the expiration of a valid prison term." Pet. App. 4a. "In light of th[at] policy," the panel held that respondent, whose Section 924(c) convictions were invalid, should not be considered to have been "imprisoned in connection with a conviction for a Federal * * * crime," within the meaning of Section 3624(e), during his final two and one-half years in prison. *Ibid.* (quoting 18 U.S.C. 3624(e)).

The panel rejected the argument that incarceration and supervised release serve distinct purposes and, accordingly, that prison time cannot be credited against time on supervised release. The panel, while acknowledging that supervised release is primarily designed to serve rehabilitative purposes, placed emphasis on the conclusion that supervised release "is also punitive in nature." Pet. App. 5a.

Judge Gilman dissented. He argued that reducing a defendant's term of supervised release to account for excess time served in prison "is contrary to both the plain language and the purpose of 18 U.S.C. § 3624(e)." Pet. App. 6a. He viewed the text of Section 3624(e) as "clear and unconditional in its requirements" that a term of supervised release begin only when "the person is released from imprisonment" and "not run during any period in which the person is imprisoned." *Id.* at 6a-7a (quoting 18 U.S.C. 3624(e)). He also observed that the purpose of supervised release—"to facilitate the integration of the violator into the community, while providing the supervision designed to limit further criminal conduct"—is not served until the violator is actually in the community. Pet. App. 7a (internal quotation marks and citation omitted). Finally, he pointed out that 18 U.S.C. 3583(e), which permits a district court to cut short a term of supervised release after one year if "warranted by the conduct of the defendant released and the interest of justice," provides a means for persons in respondent's position to be excused from a lengthy term of supervised release. Pet. App. 8a.

SUMMARY OF ARGUMENT

Congress has provided that a term of supervised release begins on the date that a federal prisoner is "released from imprisonment," 18 U.S.C. 3624(e), and not on an earlier date that, in retrospect, represents the date on which he should have been released under a retroactively applied change in the law. That conclusion follows from the statutory text and structure. It also accords with Congress's purpose of providing a period of official supervision for a defendant who is making the transition from prison into society.

Congress has defined supervised release as a term of a defendant's sentence that is to run "after imprisonment," 18 U.S.C. 3583(a), not concurrently with imprisonment. Congress has further provided that a defendant's "term of supervised release commences on the day [he] is released from imprisonment" and "does not run during any period in which [he] is imprisoned [for more than 30 days] in connection with a conviction for a Federal, State, or local crime." 18 U.S.C. 3624(e). That clear statutory language means that a term of supervised release begins only on the date that the defendant is actually released from prison, not on the earlier date that the defendant would have been

released under a change in the law that had not yet been announced or applied to his case.

Congress's principal purpose in authorizing supervised release—"to ease the defendant's transition into the community," S. Rep. No. 225, 98th Cong., 1st Sess. 124 (1983)—would be frustrated if a defendant was automatically excused from all, or some portion, of his term of supervised release because his term of incarceration was reduced to less than time served. Such defendants, as a class, are not in any less need of supervision when they return to society than any other defendant. The additional time that the defendant spent in prison was, in retrospect, unwarranted, but that provides no per se assurance that his transition into the community will be any less problematic. As this Court has recognized in another context, community supervision (in that case, probation) and imprisonment "are not fungible," because they are "fundamentally different in character." *United States* v. *Granderson*, 511 U.S. 39, 46 (1994).

Congress has not left those in respondent's circumstances without any means of seeking relief from a lengthy term of supervised release. Under 18 U.S.C. 3583(e)(1), a district court may "terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release * * * if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice." In exercising that authority, a district court may take into account that a defendant has served a period of incarceration for a subsequently overturned conviction. In addition, a district court may "reduce" or "modify" the particular conditions of a defendant's term of supervised release "at any time." 18 U.S.C. 3583(e)(2). Especially in view of

those alternative remedies, the court of appeals had no warrant to require that respondent's excess time in prison be credited against his time on supervised release.

ARGUMENT

A DEFENDANT'S TERM OF SUPERVISED RELEASE BEGINS ON THE DATE OF HIS ACTUAL RELEASE FROM PRISON, NOT ON AN EARLIER DATE ON WHICH HE SHOULD HAVE BEEN RELEASED UNDER A RETROACTIVELY APPLIED CHANGE IN THE LAW

A federal criminal defendant's term of supervised release does not commence until the date of his actual release from prison. It cannot be deemed to have commenced on any earlier date on which the defendant would have been released if a new judicial decision or other retroactively applied change in the law affecting his sentence had been announced before that date. A defendant thus is not entitled to credit the time that he spent in prison serving a sentence that was subsequently vacated against the time that he is still to spend on supervised release.

A. The Relevant Statutory Provisions Unambiguously Provide That A Term Of Supervised Release Begins Only When A Defendant Is Actually Released From Prison

Congress has spoken directly to the question presented in this case. In 18 U.S.C. 3624(e), a provision titled "Supervision after release," Congress stated that a "term of supervised release commences on the day the person is released from imprisonment" and "does not run during any period in which the person is

imprisoned in connection with a conviction for a Federal, State, or local crime."[4] See S. Rep. No. 225, 98th Cong., 1st Sess. 148 (1983) (noting that Section 3624(e) "specifies that the term [of supervised release] begins on the date of release" from prison). That language is clear, straightforward, and unambiguous. It cannot sensibly be construed to mean that a term of supervised release begins *either* on the date of a person's release from prison *or* on some earlier date on which the person would have been released under a change in the law that had not yet been announced. See *United States* v. *Joseph*, 109 F.3d 34, 38 (1st Cir. 1997) (recognizing that "the language in § 3624(e) must be given its plain and literal meaning," *i.e.*, that "a person's term of supervised release does not begin until the peson has been released from prison") (quoting *Quinones* v. *United States*, 936 F. Supp. 153, 155 (S.D.N.Y. 1996)).[5]

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[4] The statute contains a limited exception applicable where "the imprisonment is for a period of less than 30 consecutive days." 18 U.S.C. 3624(e).

[5] In addition to the First Circuit in *Joseph*, two other courts of appeals have held that a term of supervised release commences on the defendant's actual release date, not the date on which he should have been released under a revised sentence. See *United States* v. *Jeanes*, 150 F.3d 483, 485 (5th Cir. 1998); *United States* v. *Douglas*, 88 F.3d 533, 534 (8th Cir. 1996) (per curiam); see also *United States* v. *Jaramillo*, No. 98-2005, 1998 WL 536387 (10th Cir. Aug. 18, 1998) (unpublished disposition noted at 156 F.3d 1245), cert. denied, 119 S. Ct. 832 (1999). The Ninth Circuit, like the Sixth Circuit in this case, has held that a defendant's term of supervised release must be deemed to have commenced on the date that he should have been released from prison according to his revised sentence, not on the date that he was actually released after the revised sentence was imposed. See *United States* v. *Blake*, 88 F.3d 824, 825 (1996). The court in *Blake* reached that conclusion in the context of a sentence that was modified in light of a retroactively applied change in the Sentencing Guidelines. See 18 U.S.C. 3582(c)(2); Sentencing Guidelines § 1B1.10(b). The Sentencing Commission responded to *Blake* by prohibiting a reduction in a term of imprisonment to less than time served as a result of such a change in the Guidelines. The effect of that amendment is to prohibit a shortening of a term of supervised release in the circumstances involved in *Blake*. See pages 19-20, *infra*.

Other statutory provisions confirm that Congress intended that a term of supervised release would begin only when the defendant actually walked out the prison door. The provision authorizing the district courts to impose supervised release as part of a defendant's sentence, 18 U.S.C. 3583, is titled "Inclusion of a term of supervised release *after imprisonment*" (emphasis added). The initial sentence of that provision states that "[t]he court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release *after imprisonment*." 18 U.S.C. 3583(a) (emphasis added).[6] The Senate Report on Section 3583 is in accord. See S. Rep. No. 225, *supra*, at 123 ("This section permits the court, in imposing a term of imprisonment for a felony or a misdemeanor, to include as part of the sentence a requirement that the defendant serve

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[6] Section 3583 is part of chapter 227 of the Criminal Code, titled "Sentences," and is primarily concerned with the district courts' role at the time of sentencing with respect to supervised release. Section 3624(e) is part of chapter 229 of the Criminal Code, titled "Postsentence Administration," and is concerned with the implementation of a sentencing term imposing supervised release. Both provisions contemplate that the term of supervised release begins after completion of the term of imprisonment.

a term of supervised release *after he has served the term of imprisonment.*") (emphasis added).

This Court has recognized that a term of supervised release is distinct from, and consecutive to, a term of incarceration. See *Granderson*, 511 U.S. at 50 (noting that "terms of supervised release * * * follow up prison terms"); *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 407 (1991) ("[s]upervised release is a unique method of post-confinement supervision invented by the Congress"). So, too, has the United States Sentencing Commission, which is charged with "establish[ing] sentencing policies and practices for the Federal criminal justice system." 28 U.S.C. 991(b)(1). The Sentencing Commission has prescribed that district courts "shall order a term of supervised release *to follow imprisonment* when a sentence of imprisonment of more than one year is imposed, or when required by statute," and "may order a term of supervised release *to follow imprisonment* in any other case." Sentencing Guidelines § 5D1.1 (emphases added).

The ordinary meaning of the term "release" confirms that a term of supervised release does not run while the defendant is still in prison. The word "release" is an antonym of the words "detention" and "imprisonment." See William D. Lutz, *The Cambridge Thesaurus of American English* 387 (1994) (release/detention); *The Penguin Dictionary of English Synonyms and Antonyms* 344 (1992) (release/imprisonment); see also *Webster's Dictionary of Synonyms* 690 (1942) ("release" is an antonym of "[d]etain (as a prisoner)"). In accordance with common English usage, then, a defendant cannot be both imprisoned and released (even with supervision) at the same time. Cf. *Reno* v. *Koray*, 515 U.S. 50, 57 (1995) (contrasting "release" and "detention" under the bail reform provisions of the Comprehensive

Crime Control Act of 1984); *Hinckley* v. *United States*, 163 F.3d 647, 653 (D.C. Cir. 1999) (contrasting "release" and "confine" under a provision of the District of Columbia Code).

The court of appeals conceded (Pet. App. 4a) the force of the language of Section 3624(e), but found a counterweight in Section 3624(a), which states that "[a] prisoner shall be released by the Bureau of Prisons on the date of the expiration of [his] term of imprisonment." Contrary to the court of appeals' reasoning, Section 3624(a) does not speak to the issue here. It does not suggest that a defendant's term of imprisonment should be deemed to "expir[e]" on any date other than the one dictated by the sentence imposed by the district court. The court of appeals' construction of Section 3624(a) implies that the Bureau of Prisons must continually assess, with respect to each prisoner in the federal system, whether the prisoner is entitled to an early release as a result of a new judicial decision or other change in the law. But Congress has left such determinations to the district court that sentenced the prisoner. See 28 U.S.C. 2255; 18 U.S.C. 3582(c).[7]

Congress has explicitly provided in other circumstances for a defendant to receive a "credit" against his sentence. For example, a prisoner "may receive credit toward the service of [his] sentence" of up to 54 days a

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[7] The Senate Report confirms that Section 3624(a) was not intended to address the situation presented in this case. Section 3624(a) was instead designed to "replace[] a confusing array of statutes and administrative procedures concerning the determination of the date of release of a prisoner," which had, among other things, required the Bureau of Prisons and the Parole Commission to engage in duplicative recordkeeping and "constant evaluation of prisoner eligibility for release." S. Rep. No. 225, *supra*, at 144.

year if the Bureau of Prisons determines that he "has displayed exemplary compliance with institutional disciplinary regulations." 18 U.S.C. 3624(b) (1994 & Supp. III 1997); see also 18 U.S.C. 3585(b) (providing that "[a] defendant shall be given credit toward the service of a term of imprisonment" for certain "time he has spent in official detention prior to the date the sentence commences"). Such provisions demonstrate that, when Congress intends to allow a credit against a defendant's sentence, Congress does so expressly. Congress did not do so with respect to the terms of supervised release of defendants who served time in prison under a sentence that is subsequently vacated. It would thus be particularly unwarranted to construe Section 3624(a), or any other provision of the Criminal Code, as implicitly authorizing a credit for such defendants.

B. Congress's Principal Purpose In Authorizing Supervised Release—"To Ease The Defendant's Transition Into The Community"—Would Be Undermined If A Defendant's Excess Prison Time Automatically Reduced His Time On Supervised Release

The conclusion that a term of supervised release commences only when a defendant is actually released from prison accords with Congress's principal purpose in establishing supervised release as a distinct component of a defendant's sentence. The Senate Report explained that "the primary goal of such a term is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release." S. Rep. No. 225, *supra*, at 124. The Senate Report added that supervised release was not designed to serve "the sentencing purposes of incapacitation and punishment." *Ibid.*; see also *id.* at 125 ("The term of supervised release * * * follows a term of imprisonment and may not be imposed for purposes of punishment or incapacitation since those purposes will have been served to the extent necessary by the term of imprisonment."). Congress perceived that the goal of assisting a defendant's integration into the community was not adequately served under the existing parole system, because a defendant was subject to supervision only if he was released from prison early by the Parole Commission, but not if he remained incarcerated for the full term imposed by the district court. *Id.* at 122-124. Congress thus intended that "[t]he term of supervised release would be a separate part of the defendant's sentence, rather than being the end of the term of imprisonment," so that whether, and to what extent, a defendant would be subject to supervision would turn on the needs of the defendant and the community, rather than "on the almost sheer accident of the amount of time that happens to remain of the term of imprisonment when the defendant is released." *Id.* at 123, 124.

Congress's purposes for authorizing supervised release are further reflected in 18 U.S.C. 3583(c), which provides that a district court, in determining whether to impose a term of supervised release and the duration and conditions of any such term, shall consider certain of the "factors to be considered in imposing a sentence" enumerated in 18 U.S.C. 3553(a). Section 3583(c), as originally enacted in 1984, identified six of those factors: "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. 3553(a)(1); "the need * * * to afford adequate deter-

rence to criminal conduct," 18 U.S.C. 3553(a)(2)(B); "the need * * * to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner," 18 U.S.C. 3553(a)(2)(D); "the kinds of sentences and the sentencing range established for * * * the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission," 18 U.S.C. 3553(a)(4); "any pertinent policy statements issued by the Sentencing Commission," 18 U.S.C. 3553(a)(5); and "the need to avoid unwarranted sentence disparities," 18 U.S.C. 3553(a)(6). § 212(a)(2), 98 Stat. 1989-1990, 1999. Congress amended 18 U.S.C. 3585(c) in 1987 to require district courts to consider a seventh factor in the supervised release determination: "the need * * * to protect the public from further crimes of the defendant," 18 U.S.C. 3553(a)(2)(C). Sentencing Act of 1987, Pub. L. No. 100-182, § 9, 101 Stat. 1267. Notably absent from the list of factors that Congress has deemed relevant to the supervised release determination is 18 U.S.C. 3553(a)(2)(A), "the need * * * to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." See also Sentencing Guidelines § 5D1.1, comment. (n.1) (1998) (recognizing that the purposes of supervised release include "to protect the public welfare," "to provide drug or alcohol treatment or testing," and "to assist the reintegration of the defendant into the community").

Congress thus contemplated that supervised release would serve purposes distinct from incarceration. It would aid a defendant in making his "transition into the community" after his release from prison—for example, by assisting him in obtaining vocational training,

medical treatment, or substance abuse counseling. See 18 U.S.C. 3553(a)(2)(D); Sentencing Guidelines § 5D1.3 (enumerating mandatory and discretionary conditions of supervised release). It would at the same time provide a measure of security to the community into which the defendant is released by enabling the United States Probation Office to monitor him during the transition period. See 18 U.S.C. 3553(a)(2)(C). Those purposes cannot effectively be served until the defendant is living in the community.

The mere fact that a defendant has served more time in prison than he would have served, if a judicial decision affecting the validity of a portion of his sentence had been announced earlier, offers no assurance that his transition into the community will be any less difficult. To the contrary, as Congress recognized, a defendant who is returning to the community "after the service of a long prison term" may be particularly in need of supervision. S. Rep. No. 225, *supra*, at 124; cf. Harold B. Wooten, *Violation of Supervised Release*, 6 Fed. Sentencing Rep. 183 (1993) ("With longer periods of incarceration come greater difficulties in reintegrating into communities. Social relationships must be built anew. Released offenders must find jobs when market skills have passed them by for all but the most menial tasks."). The court of appeals' position would recreate, with respect to defendants in respondent's position, a defect that Congress identified in the parole system and sought to eliminate with supervised release: that a defendant's period of supervision after his release from prison turned "on the almost sheer accident of the amount of time that happens to remain of the term of imprisonment when the defendant is released," rather than on the needs of the defendant and the community. S. Rep. No. 225, *supra*, at 124.

In sum, because Congress intended that incarceration and supervised release would serve different purposes, prison time cannot properly be treated as interchangeable with time on supervised release. As the First Circuit has explained in reaching a result contrary to that of the Sixth Circuit in this case:

> [S]upervised release is intended to facilitate the integration of the violator into the community, while providing the supervision designed to limit further criminal conduct. Incarceration, to the contrary, does nothing to assist a defendant's transition back into society and is not a reasonable substitute for a portion of the supervised release term.

Joseph, 109 F.3d at 38-39 (internal quotation marks and citations omitted). Indeed, this Court has reached a similar conclusion with respect to another form of community supervision, observing that "probation and imprisonment are not fungible; they are sentences fundamentally different in character." *Granderson*, 511 U.S. at 46 (internal quotation marks omitted). So, too, terms of supervised release and terms of incarceration "are not fungible" because they are "fundamentally different in character."

C. Congress Has Provided A Different Avenue Of Relief For A Defendant Who Has Been Incarcerated On A Subsequently Vacated Conviction

A person in respondent's position is not without a means of seeking relief from a lengthy term of supervised release. Under 18 U.S.C. 3583(e)(1), a district court may "terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release * * * if it is satisfied that such action is warranted by the conduct

of the defendant released and the interest of justice." As the Fifth Circuit has suggested, in assessing whether a defendant's supervised release should be terminated early in "the interest of justice," a district court "may take into account the fact that a defendant served time under a wrongful conviction and sentence." *United States* v. *Jeanes*, 150 F.3d 483, 485 (1998); accord *Joseph*, 109 F.3d at 39; cf. *United States* v. *Spinelle*, 41 F.3d 1056, 1060-1061 (6th Cir. 1994) (statute requiring a minimum term of supervised release does not preclude a district court from exercising its authority under Section 3583(e)). A district court may also "modify" or "reduce" any condition of supervised release "at any time prior to the expiration or termination of the term of supervised release." 18 U.S.C. 3583(e)(2).

In a related context, the Sentencing Commission has indicated that discretionary reduction of a term of supervised release under Section 3583(e), rather than automatic reduction or elimination of that term, is the proper response when a defendant's term of imprisonment is reduced because of a retroactively applied change in the law. The Sentencing Commission has provided that, in cases where a defendant has served more time in prison than would be required under an amendment to the Sentencing Guidelines, the district court cannot reduce the defendant's sentence to less than time served. Sentencing Guidelines § 1B1.10(b). The court may, however, take the defendant's excess prison time into account as part of the totality of circumstances bearing on whether to grant a motion for early termination of supervised release under Section 3583(e)(1). Sentencing Guidelines § 1B1.10, comment. (n.5). The Sentencing Commission also made clear that "the fact that a defendant may have served a longer term of imprisonment than the court determines would

have been appropriate in view of the amended guideline range shall not, without more, provide a basis for early termination of supervised release." *Ibid.*[8]

Although a defendant who has spent excess time in prison in connection with an invalidated sentence is not entitled to a credit against the time that he still must serve on supervised release, he would be entitled to a credit against the time that he still must serve in prison in connection with another sentence that was to run consecutively to the invalidated sentence. That is because "[m]ultiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment." 18 U.S.C. 3584(c). Respondent was unable to take advantage of that mechanism because he had no additional federal prison time to serve. But that is no reason to undermine the function of supervised release by automatically excusing those in respondent's circumstances from all, or some portion, of their terms of supervised release.[9]

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[8] The Sentencing Commission adopted that approach to prevent a defendant from circumventing the supervised-release process by obtaining a retroactive reduction of his sentence to less than time served. See note 5, *supra* (discussing *Blake*).

[9] In some circumstances, a person who has served time in prison in connection with a federal conviction that is subsequently invalidated may be entitled to compensation from the United States. See 28 U.S.C. 1495 (authorizing damages action in the Court of Federal Claims "by any person unjustly convicted of an offense against the United States and imprisoned"); 28 U.S.C. 2513 (setting forth the conditions under which damages may be obtained under Section 1495 and limiting such damages to $5000). The courts of appeals have agreed that Section 1495 provides a remedy only to "those who can show that they are innocent of any criminal offense." *Betts* v. *United States*, 10 F.3d 1278, 1283 (7th Cir. 1993); see *Osborn* v. *United States*, 322 F.2d 835, 840 (5th Cir. 1963) ("[T]he claimant must be innocent of the particular charge and of any other crime or offense that any of his acts might constitute.") (quoting H.R. Rep. No. 2299, 75th Cong., 3d Sess. 2 (1938)); *United States* v. *Brunner*, 200 F.2d 276, 280 (6th Cir. 1952) ("Innocence of the [claimant] must be affirmatively established and neither a dismissal nor a judgment of not guilty on technical grounds is enough.").

In sum, given that a defendant who has served excess time in prison as a result of a subsequently invalidated conviction *may* obtain a reduction in his term of supervised release, if the district court determines that such a reduction is justified by the defendant's conduct and "the interest of justice," there is little equitable force to the court of appeals' position that such a defendant *must* receive a reduction in his term of supervised release without regard for the needs of the defendant and the community into which he is released. No reason therefore exists to depart from the plain language of the statute, which states that a term of supervised release begins when the defendant is released from prison, and not while he remains in federal, state, or local custody. 18 U.S.C. 3624(e).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUORY PROVISONS INVOLVED

Section 3553(a) of Title 18 of the United States Code provides as follows:

Factors To Be Considered In Imposing A Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

Section 3583 of Title 18 of the United States Code provides as follows:

Inclusion Of A Term Of Supervised Release After Imprisonment

(a) In General.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a require-

ment that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) Authorized Terms Of Supervised Release.—Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) Factors To Be Considered In Including A Term Of Supervised Release.—The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6).

(d) Conditions Of Supervised Release.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public,

private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person described in section 4042(c)(4), that the person report the address where the person will reside and any subsequent change of residence to the probation officer responsible for supervision, and that the person register in any State where the person resides, is employed, carries on a vocation, or is a student (as such terms are defined under section 170101(a)(3) of the Violent Crime Control and Law Enforcement Act of 1994). The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to

be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

(e) Modification Of Conditions Or Revocation.—The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6)—

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post-release supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose

term is revoked under this paragraph may not be required to serve more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) Written Statement Of Conditions.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) Mandatory Revocation For Possession Of Controlled Substance Or Firearm Or For Refusal To Comply With Drug Testing.—If the defendant—

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm; or

(3) refuses to comply with drug testing imposed as a condition of supervised release;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

(h) Supervised Release Following Revocation.—When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3), the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

(i) Delayed Revocation.—The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

Section 3624 of Title 18 of the United States Code provides, in pertinent part, as follows:

Release of a prisoner

(a) Date Of Release.—A prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment, less any time credited toward the service of the prisoner's sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

* * * * *

(e) Supervision After Release.—A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment and runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release. A term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days. No prisoner shall be released on supervision unless such prisoner agrees to adhere to an installment schedule, not to exceed two years except in special circumstances, to

pay for any fine imposed for the offense committed by such prisoner.